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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JAMES BROWN,
Petitioner,
v.
SECRETARY OF THE ARMY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

ROGER E. WARIN
Counsel of Record
MINDY A. KAIDEN
SHANNEN W. COFFIN
BRIAN A. DAVIS
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-3000

JOSEPH M. SELLERS
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS
1300 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 835-0031
Counsel for James Brown

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QUESTION PRESENTED

Whether Section 114(2) of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-16(d) (1994), permits an award against the United States of interest on attorneys' fees and expenses incurred before enactment of the legislation.

PARTIES TO THE ACTION

Plaintiff

James Brown

Defendant

Secretary of the Army

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner James Brown discloses that he is not a corporate entity and therefore has no parent company or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE ACTION	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The District Court's Decision	3
B. The Court of Appeals Decision	5
C. The Decision Denying Rehearing	7
REASONS FOR GRANTING THE PETITION	8
I. INTRODUCTION	8
II. THE D.C. CIRCUIT'S DECISION DISREGARDS NORMAL RULES OF STATUTORY CONSTRUCTION WHERE THE FEDERAL GOVERNMENT CONSENTS TO SUIT	9
A. The D.C. Circuit's Decision Erroneously Declined to Apply the *Landgraf* Retroactivity Rule	10
B. The D.C. Circuit's Decision Improperly Applies the Strict Construction Rule to a Determination of the Proper Duration of the Waiver	15

TABLE OF CONTENTS—Continued

Page

III. THE D.C. CIRCUIT'S DECISION THAT THIS COURT'S *LANDGRAF* RETROACTIVITY ANALYSIS DOES NOT APPLY TO CASES INVOLVING THE FEDERAL GOVERNMENT IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS WHICH APPLY *LANDGRAF* EQUALLY TO THE FEDERAL GOVERNMENT 18

CONCLUSION 22

APPENDIX

A. *Brown v. Secretary of the Army*, Nos. 95-5026, 95-5048 (D.C. Cir. Mar. 12, 1996) 1a

B. *Brown v. Marsh*, Cir. A. No. 80-1169 (CRR) (D.D.C. Nov. 21, 1994) (opinion) 19a

C. *Brown v. Marsh*, Civ. A. No. 80-1169 (CRR) (D.D.C. Nov. 21, 1994) (order) 27a

D. *Brown v. Marsh*, Civ. A. No. 80-1169 (CRR) (D.D.C. Nov. 23, 1994) (corrective order) 28a

E. *Brown v. Secretary of the Army*, Nos. 95-5026, 95-5048 (D.C. Cir. June 14, 1996) (denial of petition for rehearing) 30a

F. *Brown v. Secretary of the Army*, Nos. 95-5026, 95-5048 (D.C. Cir. June 14, 1996) (order denying petition for rehearing) 34a

G. *Brown v. Secretary of the Army*, Nos. 95-5026, 95-5048 (D.C. Cir. June 14, 1996) (order denying rehearing *in banc*) 35a

TABLE OF AUTHORITIES

CASES — Page

Aledo-Garcia v. Puerto Rico Nat'l Guard Fund, Inc., 887 F.2d 354 (1st Cir. 1989) 14
Ardestani v. INS, 502 U.S. 129 (1991) 16
Berman v. Schweiker, 713 F.2d 1290 (7th Cir. 1983) 20
Block v. Neal, 460 U.S. 289 (1982) 15
Bradley v. Richmond School Bd., 416 U.S. 696 (1974) ..... *passim*
Brown v. Marsh, 713 F. Supp. 20 (D.D.C. 1989), *aff'd*, 918 F.2d 214 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 810 (1991) 2
Doll v. Brown, No. 93 C 4410, 1995 U.S. Dist. LEXIS 14237 (N.D. Ill. Sept. 28, 1995), *aff'd in part and rev'd in part on other grounds*, 75 F.3d 1200 (1996) 19
City of Great Falls v. United States Dep't of Labor, 673 F.2d 1065 (9th Cir. 1982) 14
Edwards v. Lujan, 40 F.3d 1152 (10th Cir. 1994), *cert. denied*, 116 S. Ct. 417 (1996) 6, 19, 21
Hill v. United States, 571 F.2d 1098 (9th Cir. 1978) 20
Huel v. Sullivan, 971 F.2d 1362 (8th Cir. 1992), *cert. denied*, 114 S. Ct. 1642 (1994) 6, 19
Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) 7, 17-18
Landgraf v. USI Film Prods., 511 U.S. 244, 114 S. Ct. 1483 (1994) ..... *passim*
Lane v. Pena, 116 S. Ct. 2092 (1996) 16
Library of Congress v. Shaw, 478 U.S. 310 (1986) .. 3, 6, 10, 15, 17
Lockley v. Chao, 812 F. Supp. 246 (D.D.C. 1993) 13-14
Loeffler v. Frank, 486 U.S. 549 (1988) 12
Rawlings v. Heckler, 725 F.2d 1192 (9th Cir. 1984) 20
Ruckleshaus v. Sierra Club, 463 U.S. 680 (1983) 6
Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) 13
Smith v. United States, 507 U.S. 197 (1993) 16

TABLE OF AUTHORITIES—Continued

Page

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 16
United States v. Shaw, 309 U.S. 495 (1940) 15
Woolf v. Bowles, 57 F.3d 407 (4th Cir. 1995) 6, 19

STATUTES

11 U.S.C. § 106 8
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 2
28 U.S.C. § 1346 8
28 U.S.C. § 1505 8
28 U.S.C. § 1961(a) 4
28 U.S.C. § 2411 8
Civil Rights Act of 1964, Title VII, *as amended by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), 42 U.S.C. § 2000e *et seq.*... 2
42 U.S.C. § 2000e-5(k) 2, 3, 5, 11-12, 15, 20
42 U.S.C. § 2000e-16(d) ..... *passim*

LEGISLATIVE MATERIALS

H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 1, at 87 (1991) 3, 9, 16

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated March 12, 1996, is reported at 78 F.3d 645 and is reproduced at pages 1a-18a of the appendix to this petition ("App."). The opinion of the Court of Appeals, dated June 14, 1996, denying rehearing and rehearing *in banc* is reported at 86 F.3d 225 and is reproduced with accompanying Orders at App. 30a-35a. The opinion of the United States District Court for the District of Columbia regarding the award of interest on attorneys' fees and expenses, dated November 21, 1994, is reported at 868 F. Supp. 15 and is reproduced at App. 19a-26a. The Order of the district court dated November 21, 1994, awarding plaintiff interest on attorneys' fees and expenses is reproduced at App. 27a. An Order dated November 23, 1994, correcting the November 21, 1994 Order is reproduced at App. 28a-29a.

JURISDICTION

Appellate jurisdiction in the United States Court of Appeals for the District of Columbia Circuit was based on 28 U.S.C. § 1291 (1994). The opinion of that Court was issued on March 12, 1996. An order denying petitioner's timely request for rehearing and rehearing *in banc* was entered June 14, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

This case involves Section 114(2) of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-16(d) (1994), which provides in relevant part that:

> The provisions of section 2000e-5(f) through (k) of this title . . . shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.[]

The text of 42 U.S.C. § 2000e-5(k) (1994) states:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

Petitioner, James Brown ("Plaintiff") is the prevailing party in a lawsuit brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994). *See Brown v. Marsh*, 713 F. Supp. 20 (D.D.C. 1989), *aff'd*, 918 F.2d 214 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 810 (1991). Brown filed a Motion for Payment of Attorney's Fees and Expenses with the district court on

February 5, 1991 pursuant to the Civil Rights Attorney's Fees Act, 42 U.S.C. § 2000e-5(k).[1]

On November 21, 1991, while plaintiff's fee petition was pending, the President signed into law the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) ("the 1991 Act"). Section 114 of the 1991 Act states:

> The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.[]

42 U.S.C. § 2000e-16(d). By incorporating 42 U.S.C. § 2000e-5(k), § 114 specifically provides that prevailing plaintiffs may recover interest on attorneys' fees awarded against the federal government. 42 U.S.C. § 2000e-16(d).

The attorneys' fee provision of § 114 was enacted in response to this Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310 (1986), which held that interest on attorneys' fees to compensate for delayed payment was not available against the United States absent an express waiver of sovereign immunity for interest. Section 114 expressly provided the waiver that the *Shaw* Court found lacking. *See* H.R. REP. No. 40, 102d Cong., 1st Sess., pt. 1, at 87 (1991).

A. The District Court's Decision

The District Court awarded Brown certain attorneys' fees and expenses. *See Brown v. Marsh*, Civ. A. No. 80-1169 (CRR), 1992 U.S. Dist. LEXIS 132465 (D.D.C.

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[1] The attorneys' fees and expenses (referred to collectively as "attorneys' fees") at issue in this appeal are those incurred for the work of the Washington Lawyers' Committee for Civil Rights and Urban Affairs ("the Washington Lawyers' Committee") and the law firm of Reed, Smith, Shaw & McClay ("Reed Smith"), who entered their appearances in this matter in the Fall of 1987.

Aug. 28, 1992). Following this Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483 (1994), which reaffirmed the holding in *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974), that a statute authorizing attorneys' fees permitted award of fees for pre-enactment legal services, Brown filed a motion seeking interest to compensate for the four-year delay in payment of attorneys' fees and expenses.[2]

On November 21, 1994, the district court, guided by this Court's decision in *Landgraf*, ruled that § 114's provision relating to attorneys' fees applied to cases pending at the time of its enactment, and awarded plaintiff interest on his attorneys' fees and expenses.[3] The district court cited three principal reasons for its decision to award plaintiff pre-Act interest. First, the district court explained that because an award of interest on attorneys' fees had always been available against private parties under the attorneys' fees statute, § 114 merely extended a preexisting right without substantively changing prior law. App. 23a-24a. Second, it determined that because attorneys' fees are "uniquely separable" from the main cause of action, interest awards on those fees are also "collateral" within the meaning of *Landgraf*. App. 24a. Finally, the district court found that § 114 provided a waiver of sovereign immunity without creating a new substantive obligation for the Government. *Id.* The Government appealed the district court decision.[4]

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[2] The services were performed from 1987 to 1991 and interest was accrued from January 1, 1988 through August 20, 1992, the date that the district court ordered that plaintiff was entitled to these fees. While the Government paid the fees in August 1992, it did not pay the interest.

[3] The court computed interest using the post-judgment interest rate. *See* 28 U.S.C. § 1961(a) (1994).

[4] Plaintiff filed a cross-appeal arguing that he is entitled to prejudgment interest at the prime rate rather than at the post-judgment interest rate prescribed by 28 U.S.C. § 1961(a). Because the Court of Appeals never reached this issue, plaintiffs do not raise the issue here.

B. The Court of Appeals Decision

On appeal, the Government argued § 114 should not be applied to pre-enactment conduct because to do so would violate the rule of *Landgraf*. It argued that § 114 affects substantive rights and thus could not be applied retroactively.[5] The Government did not argue that federal sovereign immunity barred an award of interest. In fact, it effectively conceded that § 114 of the Civil Rights Act of 1991 expressly waived the Government's sovereign immunity.[6] The sovereign immunity issue was first raised by the Court of Appeals *sua sponte* only days before oral argument. By Order dated November 9, 1995, the Court of Appeals directed the parties to be prepared to address at oral argument without supplemental briefing whether the federal government's sovereign immunity from suit barred retroactive application of § 114.

At argument, plaintiff suggested to the Court that the proper method of analysis was to determine first whether there had been an express waiver of sovereign immunity, and then if so, to analyze whether the statute had an impermissible retroactive effect using the methodology approved by this Court in *Bradley* and *Landgraf* with respect to legislation affecting private parties.

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[5] As a semantic matter, the Court in *Landgraf* held that statutes that would impair substantive rights would operate "retroactively," and thus should not be applied to pending cases. 114 S. Ct. at 1505. Procedural or collateral legislation like attorneys' fees statutes, which *are* properly applied to pending cases, specifically are not, in the Court's parlance, "retroactive." In the proceedings below, however, the district court and the Government used the term "retroactive" in a non-judgmental sense, to refer to any application of a statute to pending cases, without judgment as to whether that statute impairs substantive rights. For purpose of this petition, the term "retroactive" is used in the latter sense.

[6] The Government further conceded that other attorney's fees provisions such as § 113 of the 1991 Act (expanding the category of expenses, such as expert witness fees, that may properly be included as attorney's fees in Title VII cases) are to be applied retroactively. *See* 42 U.S.C. § 2000e-5(k).

The United States Court of Appeals for the District of Columbia Circuit reversed the decision of the district court. App. 18a. The Court of Appeals, relying on *Library of Congress v. Shaw*, held that principles of strict construction governing interpretation of waivers of sovereign immunity controlled whether § 114 applied retroactively. While the court recognized that § 114 was an express waiver of sovereign immunity in response to *Shaw*, it held that in order for that waiver to apply to pre-Act interest, Congress must include an additional and now third waiver of sovereign immunity, expressly permitting retroactive application. In doing so, however, the court seemed to invite this Court to review this question because other Courts of Appeals had disagreed with the D.C. Circuit's method of analysis:

> Despite the Supreme Court's reaffirmation in *Ruckleshaus* [*v. Sierra Club*, 463 U.S. 680 (1983)] and in *Shaw* that waivers of sovereign immunity must be construed narrowly, there remains considerable confusion about the relationship between that special rule and the principles governing the retroactivity of statutes in general. In addition to the district court in this case, the Fourth, Eighth, and Tenth Circuits have considered whether a waiver of sovereign immunity is retroactive as though the question were to be answered in part by reference to the principles in *Bradley* and *Landgraf*.

78 F.3d at 654 (citing *Woolf v. Bowles*, 57 F.3d 407, 410 (4th Cir. 1995); *Huey v. Sullivan*, 971 F.2d 1362, 1365-66 (8th Cir. 1992); *Edwards v. Lujan*, 40 F.3d 1152, 1153-54 & n.1 (10th Cir. 1994)); App. 17a. Nevertheless, the court concluded that "the rule of strict construction displaces the *Bradley* analysis when the question is whether a waiver of sovereign immunity is to be applied retroactively." 78 F.3d at 654; App. 18a.

Applying its new rule that eliminates any consideration of the *Landgraf* retroactivity principles with respect to statutes waiving sovereign immunity, the court refused to

apply § 114's express waiver of sovereign immunity, permitting interest on attorneys' fees awarded against the government to compensate for delayed payment, to pre-Act delay. 78 F.3d at 654; App. 18a.

C. The Decision Denying Rehearing

Brown requested rehearing and suggested rehearing *in banc*, arguing that this Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), dictated that once Congress has expressly waived sovereign immunity, a court should resort to ordinary principles of statutory construction, including retroactivity principles set forth in *Landgraf*, to determine the proper temporal duration of the waiver.

On petition for rehearing, Brown pointed out that the Court's reasoning in *Irwin* mirrored his argument that, where Congress provides an "unequivocally expressed" waiver of federal sovereign immunity, traditional rules of statutory construction applicable in suits against private parties should also apply in suits against the United States. Brown asserted that the rule of strict construction of waivers of sovereign immunity does not deprive a court of its traditional tools of interpreting statutes. Once an express and unequivocal waiver is established, the application of a traditional rule of statutory construction, such as equitable tolling, "amounts to little, if any, broadening of the congressional waiver." *Id.* at 95.

The Court of Appeals rejected Brown's argument that *Irwin* requires courts to apply *both* sovereign immunity and retroactivity analysis in sequence and denied Brown's petition for rehearing and suggestion for rehearing *in banc*. App. 32a-33a.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

Although the immediate question presented by this case is narrow, i.e. whether § 114(2) may be applied retroactively against the federal government, it raises important questions regarding the proper role of sovereign immunity as an obstacle to suit against the federal government. The basic issue presented here is whether, even after an express congressional waiver of sovereign immunity, that doctrine should prevent a court from applying the same rules of statutory construction to statutes authorizing suit against the federal government as it would apply in construing statutes that authorize suit against private parties. This question is potentially raised each and every time Congress consents to suit by legislation.

The D.C. Circuit's decision is the first and only decision to establish new constraints on congressional waivers of sovereign immunity. The decision requires that, where Congress enacts legislation that unequivocally waives sovereign immunity, for that legislation to apply to conduct occurring before enactment, Congress must additionally provide a clear and unequivocal statement of intent regarding retroactivity. This requirement that a congressional waiver of sovereign immunity expressly authorize retroactive application of the waiver applies different "rules of the game" to suits against the federal government than it does to legislation affecting only private parties. This additional requirement disregards the fact that the fairness concerns underlying retroactivity principles, when applied to legislation affecting private parties, are not implicated where the federal government itself consents to suit.

This case invites the Court to determine the proper relationship of the doctrine of sovereign immunity with *Landgraf* retroactivity principles. According to the Court of Appeals, the doctrine of sovereign immunity serves as a barrier to claims against the federal government not only

in the initial determination of whether the government has consented to suit, but also in each conceivable subsequent inquiry into the proper scope and/or duration of that consent. This Court's sovereign immunity jurisprudence dictates, however, that determinations of the *duration* of an express waiver of sovereign immunity are governed by ordinary tools of statutory construction. By ignoring these tools, the D.C. Circuit's decision creates an unnecessary conflict between this Court's sovereign immunity and retroactivity rules. This conflict has ramifications far beyond the result in this case or the application of this particular statute. Accordingly, review by this Court is necessary to resolve the conflict between these rules.

II. THE D.C. CIRCUIT'S DECISION DISREGARDS NORMAL RULES OF STATUTORY CONSTRUCTION WHERE THE FEDERAL GOVERNMENT CONSENTS TO SUIT

By enacting Section 114 of the Civil Rights Act of 1991, Congress unquestionably waived the federal government's sovereign immunity from several claims, including interest on attorneys' fees. *See* 42 U.S.C. § 2000e-16(d); *see also* H.R. REP. No. 40, *supra*, at 87. What remains at issue is whether that waiver of sovereign immunity encompasses retroactive application of Section 114, where traditional Supreme Court retroactivity analysis otherwise would permit such application.

In considering this question, the D.C. Circuit determined that a new retroactivity rule was required with respect to legislation affecting the liabilities of the United States. The court required that, in order to apply legislation affecting federal obligations to pre-enactment time and activities, Congress must not only expressly provide for the initial waiver of sovereign immunity but must also expressly state that the waiver be retroactive. *Brown*, 78 F.3d at 652; App. 12a. If the legislation is silent as to its retroactive application, as is § 114, then according to the D.C. Circuit, without using the statutory construc-

tion and retroactivity principles announced in *Landgraf*, the statute may not be given retroactive application.

By adopting this additional "express waiver" requirement, the D.C. Circuit held that the ordinary retroactivity rules and other rules of statutory construction applicable to legislation affecting private parties, *see Landgraf*, 511 U.S. 244, 114 S. Ct. 1483; *Bradley*, 416 U.S. 696, do not apply equally to suits against the United States. An examination of those rules demonstrates that the court's decision places an undue burden on parties suing the United States and ignores the background against which Congress legislates waivers of sovereign immunity and this specific waiver which was enacted directly in response to this Court's *Shaw* decision.

A. The D.C. Circuit's Decision Erroneously Declined to Apply the *Landgraf* Retroactivity Rule

This Court's most recent and definitive explanation of its retroactivity principles arose in *Landgraf*. At issue in *Landgraf* was whether other provisions of the Civil Rights Act of 1991, those that created a right to recover compensatory and punitive damages for certain violations of Title VII, could apply to cases pending when the statute was enacted. *Landgraf*, 114 S. Ct. at 1488. In deciding that these provisions could not apply to pending cases, the Court sought to reconcile two seemingly conflicting retroactivity principles: (1) the premise that a court must " 'apply the law in effect at the time it renders its decision' " *Id.* at 1496 (quoting *Bradley*, 416 U.S. 696, 711); and (2) the axiom that retroactivity is not favored in the law and that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* (quoting *Bowen*, 488 U.S. at 208).

In resolving that apparent tension, the Court stated its unwillingness to give "retroactive effect to statutes burdening *private rights* unless Congress ha[s] made clear its intent." *Id.* at 1499 (emhpasis added). Nevertheless,

the Court determined that there were certain categories of statutes that could be applied to pre-enactmnt conduct even where Congress had not stated its intention clearly. First, certain changes in procedural rules may be applied to suits arising before their enactment without raising retroactivity concerns. *Id.* at 1502. The second category, applicable here, are those matters, such as the attorney's fee determinations at issue in *Bradley*, which are " 'collateral to the main cause of action' " and " 'uniquely separable from the cause of action to be proved at trial.' " *Id.* at 1503 (quoting *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451-52 (1982) and citing *Hutto v. Finney*, 437 U.S. 678, 695 n.24 (1978)). In each of these classes of cases, application of a statute to preenactment conduct does not impose an "additional or unforeseeable obligation" to the affected party. *Id.* (citation omitted).

Thus, in cases involving only private parties, a lack of express guidance from Congress on the issue of retroactivity does not end the inquiry. *Id.* at 1505. Where Congress has not expressly dictated retroactivity, the "court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If not, a statute should be applied to cases pending at the time of its enactment.

The D.C. Circuit's opinion dictates that this inquiry is irrelevant in cases involving the federal government. The federal government/private party dichotomy established by this case could lead to the bizarre result that the same statute is interpreted and applied differently depending upon the identity of the defendant. That statute, 42 U.S.C. § 2000e-5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including ex-

> pert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Under this and other provisions of Title VII, prejudgment interest to compensate for delayed payment is "an element of complete compensation." *Loeffler v. Frank*, 486 U.S. 549, 558 (1988) (quoting *West Virginia v. United States*, 479 U.S. 305, 310 (1987)).

Given these rules, in cases involving purely private parties, the determination of whether interest on attorneys' fees can be applied to pre-enactment conduct is governed by *Landgraf* and *Bradley*. Under that analysis, *Landgraf* dictates that § 2000e-5(k) could be applied to pre-enactment conduct because interest on attorneys' fees, like the attorneys' fees it modifies, is merely "a collateral issue." *See* App. 24a. Thus, where a private party is the defendant, § 2000e-5(k) would authorize interest on attorneys' fees incurred before enactment of the legislation.

According to the D.C. Circuit, however, where the federal government is the defendant, not only should § 2000e-5(k), as amended by 42 U.S.C. § 2000e-16(d), not be applied to allow pre-enactment interest, but the determination to refuse to apply it to pending cases is reached employing an entirely different set of ground rules. In cases against private parties, the statute may be applied to pre-enactment conduct in the absence of congressional authorization if it is deemed to affect collateral matters, *see Landgraf*, 114 S. Ct. at 1503. Under the D.C. Circuit's rule, the very same statute shall *not* be applied to pre-enactment conduct involving the federal government. Moreover, the D.C. Circuit concluded the *Landgraf* analysis is entirely irrelevant to that inquiry.

The D.C. Circuit's express retroactive waiver requirement ignores this Court's rationale for its rule in *Landgraf*. The *Landgraf* presumption is grounded in notions of fundamental fairness. *Id.* at 1500. "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new

burdens on persons after the fact." *Id.* The Court was primarily concerned with imposing unfair burdens on private parties and the potential unpredictability of a different rule. *Id.* at 1500 & n.25. Requiring clear intent, the Court reasoned, "assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 1501.

The D.C. Circuit rule disregards the fundamental fairness concerns underlying the *Landgraf* rule.[7] Where the federal government has expressly consented to suit, the application of the waiver of sovereign immunity to pre-enactment conduct does not implicate these fairness concerns. Where the body that sets the rules decides to subject itself to suit, there is little concern for claims of notice and unfair surprise, as one court that considered the issue noted:

> [F]undamentally, the government is not a private individual, and principles of fairness that require notice and a right to be heard before subjecting private parties to retroactive liability do not obtain against the government. That is the clear import of Supreme Court rulings regarding retroactivity dating to the inception of the nation. *See, e.g., Bradley*, 416 U.S. at 724 (allowing retroactive award of attorney's fees in case against local school district); *Schooner Peggy*, 5 U.S. (1 Cranch) [103,] 110, 2 L. Ed. 49 [(1801)] (urging no retroactive application of laws in cases between *private* parties).

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[7] Moreover, the decision changes the default rules against which Congress legislates when it enacts legislation authorizing awards of attorneys' fees or related matters. When Congress enacts a statute that affects collateral matters, such as interest, it does so with an understanding that such a statute will be applied to pending cases. *See Landgraf*, 114 S. Ct. 1503-05. Thus, under *Landgraf*, Congress need not expressly state that this sort of legislation should be applied to pending cases. The D.C. Circuit rule, by contrast, requires a clear expression of congressional intent that the rule apply retroactively to allow application to pre-enactment conduct or activities.

Lockley v. Chao, 812 F. Supp. 246, 255 (D.D.C. 1993) (emphasis in original). *See also Aledo-Garcia v. Puerto Rico Nat'l Guard Fund, Inc.*, 887 F.2d 354, 356 (1st Cir. 1989) ("[I]f the party against whom the statute is to be applied is a public party, then the 'struggle' against the so-called retroactive application is not as hard."); *City of Great Falls v. United States Dep't of Labor*, 673 F.2d 1065, 1068 (9th Cir. 1982) ("[T]he Supreme Court has distinguished litigation involving . . . parties who are public entities, from private cases between individuals. . . . The Secretary of Labor and City of Great Falls are public entities, and this favors [retroactive] application of the new law."). Rather than counsel against application of congressional waiver of sovereign immunity to pending cases, then, the rationale underlying the *Landgraf* retroactivity principles actually supports such an application. Moreover, the need for uniformity in application of the statute authorizing interest on attorneys' fees further mandates that the *Landgraf* principles apply here.

The rule adopted by the D.C. Circuit wrongfully disregards long-standing principles of retroactivity established by this Court. Despite the fact that this case involves the narrow issue of interest on attorneys' fees against the federal government, the impact of the decision could be substantial. Each and every time the federal government waives its sovereign immunity from suit,[8] the D.C. Circuit decision directs courts to ignore its normal rules of construction regarding retroactive application of the waiver and look only for a clear expression of congressional in-

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[8] In addition to provisions of the Civil Rights Act of 1991, Congress has waived its sovereign immunity from suit in a broad range of cases. *See, e.g.*, 28 U.S.C. § 1346 (1994) (Federal Tort Claims Act); 11 U.S.C. § 106 (1994) (authorizing monetary damages against United States under Bankruptcy Act); 28 U.S.C. § 1505 (1994) (Indian Tucker Act); 28 U.S.C. § 2411 (1994) (expressly authorizing interest against the United States in tax refund cases).

tent that the new legislation be applied retroactively.[9] This case presents this Court the opportunity to clarify the applicability of the *Landgraf* retroactivity rules to legislation affecting the liabilities of the federal government, to provide for uniform application of those rules regardless of the parties to the suit, and to promote the fundamental fairness concerns underlying the *Landgraf* principles.

B. The D.C. Circuit's Decision Improperly Applies the Strict Construction Rule to a Determination of the Proper Duration of the Waiver

The D.C. Circuit reasoned that § 114's waiver of sovereign immunity should be strictly construed, thereby favoring one of the several competing rules of construction that this Court applies to statutory waivers.[10] The court

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[9] Two express waivers of sovereign immunity are enough. Congress first waived sovereign immunity for claims of attorneys' fees against the federal government in 42 U.S.C. § 2000e-5(k), which provides that "the United States shall be liable for costs [including attorneys' fees] the same as a private person." In 1986, the Court in *Shaw*, a five-four decision, held that although § 2000e-5(k) provided an express waiver of sovereign immunity for purposes of awarding attorneys' fees against the U.S., it did not provide a second express waiver of interest on attorneys' fees to compensate for delay in payment. *Shaw*, 478 U.S. at 319. That waiver, which *Shaw* found wanting, was supplied by Congress in § 114 of the 1991 Act, 42 U.S.C. § 2000e-16(d). The D.C. Circuit is now the first and only court to require yet a third waiver of sovereign immunity on the same topic expressly permitting interest to compensate for delayed payment of attorneys' fees for the period prior to the Act.

[10] *Compare Library of Congress v. Shaw*, 478 U.S. at 318 ("[W]e must construe waivers strictly in favor of the sovereign . . . and not enlarge the waiver 'beyond what the language requires.'") (citations omitted) *with United States v. Shaw*, 309 U.S. 495, 501 (1940) ("When authority is given, it is to be liberally construed."); *Block v. Neal*, 460 U.S. 289, 298 (1982) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.") (citations

reasoned that the principle of strict construction applies not only to the determination of whether the sovereign has consented to suit but also to the determination of the date on which that consent took effect. *Brown*, 78 F.3d at 650; App. 9a. In doing so, the D.C. Circuit misapplied the rule of strict construction. Where the question is the proper *duration* of a waiver of sovereign immunity, the rule of strict construction does not require a court to disregard normal tools of statutory construction. In fact, this Court's decisions require a court to apply those rules to the determination.

It is undisputed that, in undertaking the threshold determination of *whether* Congress has consented to suit, a court must strictly construe a statute in favor of the sovereign. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 37 (1992). Thus, a waiver of the federal government's sovereign immunity must be unequivocally expressed in the statutory text and will not be implied. *Lane v. Pena*, 116 S. Ct. 2092, 2096 (1996). In the instant case, § 114 clearly and unequivocally provides this waiver for interest on awards of attorneys' fees against the government. *See* H.R. REP. No. 40, *supra*, at 87.

Equally undisputed is the principle that a waiver of sovereign immunity will be strictly construed, in terms of its breadth, in favor of the sovereign. *Lane*, 116 S. Ct. at 2096. Thus, for instance, where the text of a statute waiving sovereign immunity is ambiguous with respect to the range of activity covered by the waiver, any doubt is resolved in favor of the government. *Id.*; *see also Ardestani v. INS*, 502 U.S. 129, 137 (1991) (refusing to expand language of waiver of sovereign immunity for claims of attorneys' fees to deportation proceedings not specified in statute).

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omitted) *and Smith v. United States*, 507 U.S. 197, 203 (1993) ("[W]e should not take it upon ourselves to extend the waiver beyond that which Congress intended . . . .").

The application of the strict construction rule to determine the proper breadth of a waiver does not mean that issues regarding the *duration* of the waiver should always be resolved in favor of the federal government. *See Irwin*, 498 U.S. at 95. In *Irwin*, this Court concluded that the doctrine of equitable tolling applied to a statute of limitations governing suits against the United States in the same manner that it would apply to statutes of limitations governing suits against private parties. Petitioner Irwin argued that the doctrine of equitable tolling should preserve his late-filed claim of wrongful termination under Title VII from the lapse of the 30-day statute of limitations applicable to claims against the federal government because his attorney was out of the country when a final notice had been delivered to his office. *Id.* at 91-92.

In considering Irwin's claim, this Court noted that the statute of limitations governing plaintiff's cause of action "is a condition to its waiver of sovereign immunity and thus must be strictly construed." *Id.* at 94 (citing *Library of Congress v. Shaw*, 478 U.S. 310 (1986)). Nonetheless, the Court concluded that the doctrine of "equitable tolling," which traditionally applied to lawsuits between private litigants, *id.* at 95, should also apply to lawsuits against the United States:

> A waiver of sovereign immunity " 'cannot be implied but must be unequivocally expressed.' " Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver.

Id. (citations omitted). Thus, the Court adopted the "general rule" that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. The Court concluded by noting,

> Because the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants.

Id. at 96.

Irwin counsels that, while the strict construction rule governs inquiries into the breadth of a waiver of sovereign immunity, questions regarding the proper duration of the waiver are not to be construed automatically in favor of the sovereign. Instead, the same principles of statutory construction should govern the inquiry in cases involving both the federal government and private parties. Despite the Court of Appeals' conclusion to the contrary, then, application of *Landgraf* retroactivity principles to legislation affecting the obligations of the United States is not foreclosed by the rule of strict construction. Rather, because it is a question affecting the proper timing of a waiver of sovereign immunity, *Irwin* dictates that "no more favorable" a rule of construction "may be employed against the Government than is employed in suits between private litigants." *Id.* at 96.

III. THE D.C. CIRCUIT'S DECISION THAT THIS COURT'S *LANDGRAF* RETROACTIVITY ANALYSIS DOES NOT APPLY TO CASES INVOLVING THE FEDERAL GOVERNMENT IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS WHICH APPLY *LANDGRAF* EQUALLY TO THE FEDERAL GOVERNMENT

In *Brown*, the D.C. Circuit held that this Court's retroactivity analysis in *Landgraf* does not apply to cases involving the federal government. Other circuits have held that it does. The D.C. Circuit recognized this conflict when it noted "considerable confusion about the relationship between [the rule of strict construction of waivers] and the principles governing the retroactivity of statutes in general." *Brown*, 78 F.3d at 654; App. 17a.

The D.C. Circuit is the only circuit to conclude that legislation affecting the obligations of the federal government is not subject to *Landgraf* analysis. Several courts, on the other hand, have reasoned that *Landgraf* applies equally to the federal government as it does to private parties. In *Edwards v. Lujan*, 40 F.3d 1152, 1154 (10th Cir. 1994), *cert. denied*, 116 S. Ct. 417 (1996), the Tenth Circuit held that the presumption against retroactive application reaffirmed in *Landgraf* applies with equal force to § 114's authorization of interest on back pay awards, *id.* at 1154 n.1, but did so without reference to principles of sovereign immunity. Thus, the case suggests that the same retroactivity principles applicable to private parties should be applied to legislation affecting the federal government. Similarly, in *Woolf v. Bowles*, 57 F.3d 407 (4th Cir. 1995), the Fourth Circuit analyzed the issue of whether § 114 authorizes interest on back pay awards against the federal government in pending cases, concluding that it does not. *Id.* at 410. In reaching that conclusion, however, the court analyzed the issue primarily under the *Landgraf* rule. The Court reasoned that section 114 would "impose an important new legal burden on the federal government," *id.*, referring only elliptically to the strict construction rule. *See also Huey v. Sullivan*, 971 F.2d 1362, 1365-66 (8th Cir. 1992) (utilizing *Landgraf* analysis), *cert. denied*, 114 S. Ct. 1642 (1994).

Some courts have decided that sovereign immunity doctrine does not bar retroactive application of certain statutes to the United States. The United States District Court for the Northern District of Illinois noted that, because § 114 waived sovereign immunity, the analysis in *Landgraf*, and not the rule of strict construction, was the appropriate analysis. *See Doll v. Brown*, No. 93 C 4410, 1995 U.S. Dist. LEXIS 14237, at **3-9 (N.D. Ill. Sept. 28, 1995), *aff'd in part and rev'd in part on other grounds*, 75 F.3d 1200, 1207 (1996).

Other courts addressing the issue before *Landgraf* also declined to displace retroactivity analysis with that of sovereign immunity. *See Berman v. Schweiker*, 713 F.2d 1290, 1300-01 (7th Cir. 1983) (finding, however, in context of Equal Access to Justice Act, explicit waiver of immunity); *Rawlings v. Heckler*, 725 F.2d 1192, 1194 (9th Cir. 1984) (explaining that sovereign immunity issues did not affect basic retroactivity analysis); *Hill v. United States*, 571 F.2d 1098, 1102 (9th Cir. 1978) (applying retroactivity analysis against the government after examining in depth sovereign immunity doctrine in context of the Administrative Procedure Act).

Furthermore, the United States itself does not agree with the D.C. Circuit that this Court's decision in *Landgraf* should be ignored in determining whether § 114's express waiver of sovereign immunity applies with respect to award of pre-Act interest on attorneys' fees. In its brief and at oral argument below, although opposing pre-Act interest, the United States argued that the proper analysis of the interest and sovereign immunity issues was *Landgraf*'s collateral/non-collateral issues framework. In fact, the United States acknowledged that another section of the 1991 Act, 42 U.S.C. § 2000e-5(k), which permits the award of expert witness fees against the United States, applies "retroactively" to fees incurred before the passage of the Act because such fees are "collateral" under *Landgraf*. However, if the D.C. Circuit's analysis in *Brown* were applied, because the 1991 Act's express waiver of sovereign immunity with respect to expert witness fees does not also expressly state that this waiver is retroactive, then such fees would not be recoverable.

This "considerable confusion" recognized by the D.C. Circuit does not present merely a theoretical question regarding the proper intersection of the doctrines of sovereign immunity and retroactivity. Instead, the varying approaches employed by the circuits will likely lead to

equally varying conclusions among the circuits. For instance, under the analysis employed by the Tenth Circuit in *Edwards v. Lujan*, § 114's authorization of interest on attorneys' fees would be applicable to pending cases. Unlike back pay awards, which are compensatory in nature, attorneys' fees are "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial." *Landgraf*, 114 S. Ct. at 1503. Thus, unlike interest on back pay, which adds to a compensatory award, interest on those attorneys' fees would similarly be uniquely separable from the main cause of action and applicable to pending cases.

CONCLUSION

This case raises an important issue regarding a conflict of the doctrine of sovereign immunity and the *Landgraf* retroactivity principles, which is likely to recur in this and other contexts if left uncorrected and the doctrine unclarified. Given the interest in fairness and uniform application of statutes, the D.C. Circuit's determination that *Landgraf* does not apply to legislation affecting the federal government improperly resolves the conflict. This Court should accept the invitation of the Court of Appeals to clarify the intersection between these potentially conflicting doctrines and thus grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

ROGER E. WARIN
Counsel of Record
MINDY A. KAIDEN
SHANNEN W. COFFIN
BRIAN A. DAVIS
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-3000

JOSEPH M. SELLERS
WASHINGTON LAWYERS'
COMMITTEE FOR CIVIL RIGHTS
AND URBAN AFFAIRS
1300 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 835-0031
Counsel for James Brown